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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

In the Matter of the Application of
[REDACTED]

Petitioner,

-against-

NEW YORK STATE BOARD OF PAROLE,

Respondent.

ANSWER AND RETURN

Index No. [REDACTED]
Hon. Victor Grossman

Respondent, by and through his attorney, Eric T. Schneiderman, Attorney General of the State of New York, Elizabeth Gavin, of counsel, submits the following as an answer and return upon the petition:

1. Denies each and every allegation of the petition except to the extent they are confirmed by the attached records and leaves the determination of legal issues and conclusions contained therein to the Court.
2. The grounds for respondent's actions are fully set forth in the determinations being challenged and the Return annexed hereto.
3. The determinations and record demonstrate that respondent acted in compliance with the law and that the determination was neither arbitrary, nor capricious.

PRELIMINARY STATEMENT

4. Petitioner, an inmate at Otisville Correctional Facility, is serving a sentence of incarceration of fifteen (15) years to Life for two (2) counts of Robbery in the 1st degree and one (1) count of Murder in the 2nd degree. Exhibit 1.

5. This sentence arises from indictments related to three (3) separate incidents. On August 17, 1994, petitioner and an accomplice robbed a liquor store at gunpoint. Exhibit 2, Page 3. They handcuffed an employee, duct taped the hands of a customer, and stole five thousand (5,000) dollars in cash, a gold chain from the customer, and several bottles of liquor. Id. On August 24, 1994, petitioner and two accomplices robbed another liquor store at gunpoint. Id. They stole two thousand (2,000) dollars, a bracelet and a cordless phone from the store's owner, and a chain with diamonds from an employee. Id. On August 31, 1994, petitioner and an accomplice returned to the first liquor store to rob it at gunpoint a second time. Id. They stole cash, jewelry from the owner, and liquor. Id. However, this time the store's owner followed petitioner and his accomplice in his own car with his own handgun. Exhibit 2, Page 4. There ensued a car chase, with the petitioner as the driver of the getaway car. Id. During the course of the chase, the parties exchanged gunfire from inside their respective vehicles. Id. Ultimately, petitioner hit a fourteen (14) year old boy who was riding his bicycle, who died of his injuries. Id. Petitioner fled the scene of the accident, but was later apprehended. Id.

6. Prior to these incidents, petitioner had three (3) prior criminal convictions. Exhibit 2, Page 2. On May 12, 1988, petitioner and accomplices beat and robbed a seventy-one (71) year old man on a subway train. Id. This was a juvenile offense, and petitioner was sentenced to one year of probation. Id. While on probation, petitioner and accomplices, beat and robbed another man on the subway. Id. For this, and the probation violation, petitioner was sentenced to one (1) year in a juvenile facility. On November 28, 1989, petitioner was convicted of unauthorized use of a motor vehicle, for which he received a sentence of thirty (30) days. Id.

7. On April 26, 2017, petitioner had his fifth (5th) interview with the Board of Parole (hereinafter “the Board”) for discretionary release. Exhibit 4, Page 1; Exhibit 3, Page 4. At the conclusion of that interview, the Board denied petitioner discretionary parole release and ordered that he be held for an additional eighteen (18) months. Exhibit 5. On August 22, 2017, petitioner perfected his administrative appeal of this determination. Exhibit 6. On September 14, 2017, the Parole Board Administrative Appeals Unit affirmed the Board’s determination. Exhibit 8. This petition followed.

AS AND FOR A DEFENSE TO THE PETITION

8. The petition raises the following issues: 1) that the Board failed to consider petitioner’s youth and attendant circumstances in making its decision; 2) that the Board based its decision solely on the seriousness of the instant offense; 3) that the Board failed to consider conditional release for deportation only as a mitigating factor; and 4) the Board’s decision was impermissibly lacking in detail.

9. Petitioner’s reliance on Matter of Hawkins is misplaced. Matter of Hawkins v. New York State Department of Corrections and Comm. Supv., 140 A.D.3d 34 (3d Dept. 2016). Petitioner’s allegation is that the Board failed to consider that his previous juvenile convictions were committed as a minor. However, petitioner’s interpretation of the Hawkins case is erroneous. Hawkins deals with the rights of inmates with indeterminate sentences with a maximum of life, who committed the crimes for which they are seeking parole, while minors. Id. at 38. Petitioner was age twenty-three (23) at the time that he committed the crimes for which he is currently incarcerated. Exhibit 4, Page 7. The holding of Hawkins is wholly inapplicable under these circumstances.

10. Petitioner is correct in noting that the Board did place emphasis on the fact that prior to committing the instant offenses, he had three previous convictions, two of which he alleges were committed while he was under eighteen (18). Exhibit 4, Page 7; Exhibit 5. It is well settled that the Board is within its rights to consider an offender's youthful offenses in making a determination to deny parole. Matter of Amen v. New York State Div., 100 A.D.3d 1230 (3d Dept. 2012); Matter of Murray v. Evans, 83 A.D.3d 1320 (3d Dept. 2011); Matter of Martin v. New York State Div. of Parole, 47 A.D.3d 1152 (3d Dept. 2008); Matter of Waters v. New York State Div. of Parole, 271 A.D.2d 779, (3d Dept. 2000); Matter of Pina v. Hammock, 89 A.D.2d 799 (4th Dept. 1982).

11. Petitioner's contention that the Board's decision is impermissible as it was based solely on the instant offense is without merit. The record is replete with references to other factors considered in this case. In addition to his prior record, which is discussed above, of great importance to the Board was the fact that petitioner's prior record included a violation of his probation. Exhibit 5. Further, the Board noted that the instant offense demonstrated an escalation of petitioner's violent conduct. Exhibit 4, Pages 7-8. Additionally, the Board was concerned that while petitioner committed these offenses with accomplices, the crimes involved different accomplices, and petitioner was the leader and orchestrator of these crimes. Exhibit 4, Page 5. The Board is, in fact, obligated to consider the petitioner's prior criminal record. Matter of Partee v Evans, 117 A.D.3d 1258 (3d Dept. 2014). The Board may put more weight on the inmate's criminal history. Bello v Board of Parole, 149 A.D.3d 1458 (3d Dept. 2017); Hall v New York State Division of Parole, 66 A.D.3d 1322 (3d Dept. 2009); Davis v Evans, 105 A.D.3d 1305 (3d Dept. 2013); Jones v New York State Parole Board, 127 A.D.3d 1327 (3d Dept. 2015); Wade v Stanford, 148 A.D.3d 1487 (3d Dept. 2017). The fact that the Board afforded greater weight to the inmate's criminal history, and not to an alleged positive institutional adjustment, does not render the denial of parole for that reason irrational or

improper. Matter of Ortiz v. Hammock, 96 A.D.2d 735 (4th Dept 1983); Peo. ex rel. Yates v. Walters, 111 A.D.2d 839 (2d Dept. 1985); Matter of Ristau v. Hammock, 103 A.D.2d 944 (3d Dept. 1984) lv. to appeal den. 63 N.Y.2d 608 (1984); Torres v New York State Division of Parole, 300 A.D.2d 128 (1st Dept 2002); Lashway v Evans, 110 A.D.3d 1420 (3d Dept. 2013).

12. The denial of parole release based upon nature of conviction and criminal history is appropriate. In the Matter of Hawkins v. Travis, 259 A.D.2d 813 (3d Dept. 1999); Farid v. Russi, 217 A.D.2d 832 (3d Dept. 1995); Charlemagne v New York State Division of Parole, 281 A.D.2d 669 (3d Dept 2001); Burress v Evans, 107 A.D.3d 1216 (3d Dept. 2013); Boccadisi v Stanford, 133 A.D.3d 1169 (3d Dept. 2015); Bush v Annucci, 148 A.D.3d 1392 (3d Dept. 2017).

13. Additionally, during the course of the interview, the Board reviewed his COMPAS and substance abuse history, his case plan, his proposed employment upon release, his education, and his progress and positive personal statement. Exhibit 4, Pages 11-14, 19-20. While not all of the factors to be considered by the Board were actually discussed with the appellant at the interview, it is well settled that the failure to do so does not provide a basis for upsetting the Board's decision. Morel v Travis, 18 A.D.3d 930 (3d Dept. 2005); Matter of Waters v. New York State Division of Parole, 252 A.D.2d 759, 760-61 (3d Dept 1998), *lv. denied*, 92 N.Y.2d 812 (1998); Matter of Davis v. New York State Div. of Parole, 114 A.D.2d 412 (2d Dept. 1985); Matter of Mackall v. New York State Board of Parole, 91 A.D.2d 1023 (2d Dept. 1983) Mullins v New York State Board of Parole, 136 A.D.3d 1141 (3d Dept. 2016). That the Board did not discuss each factor with the inmate at the interview does not constitute convincing evidence that the Board did not consider the factors. In the Matter of Hawkins v. Travis, 259 A.D.2d 813 (3d Dept. 1999), *app. dism.* 93 N.Y.2d 1033 (1999); Dolan v New York State Board of Parole, 122 A.D.3d 1058 (3d Dept. 2014); In re Garcia v. New York State Division of Parole, 239 A.D.2d 235 (1st Dept. 1997); Matter of Mackall v. NYS Board of

Parole, 91 A.D.2d 1023, 1024 (2d Dept 1983); Charlemagne v New York State Division of Parole, 281 A.D.2d 669 (3d Dept 2001). Nor is the Board required to expressly discuss or articulate every factor in its determination. Fraser v Evans, 109 A.D.3d 913 (3d Dept. 2013); Faison v Travis, 260 A.D.2d 866 (3d Dept 1999) *lv. dismissed* 93 N.Y.2d 1013 (1999); Shark v New York State Division of Parole Chair, 110 A.D.3d 1134 (3d Dept. 2013); LeGeros v New York State Board of Parole, 139 A.D.3d 1068 (2d Dept. 2016).

14. Petitioner's argument that the Board failed to consider Conditional Release for Deportation Only (CDPO) is without merit. Further, petitioner's reliance on Matter of Ciaprazi is misguided, as the decision cited by petitioner was vacated by the Court in a subsequent unreported decision. Matter of Ciaprazi v Evans, 52 Misc. 3d 1211(A) (Sup. Ct. Dutchess 2016). The subsequent decision is annexed and attached hereto as Exhibit 14. A deportation order is not determinative and is only one factor to consider in determining parole release and the existence of such order does not require an inmate's release. Kelly v Hagler, 94 A.D.3d 1301 (3d Dept. 2012); de los Santos v Division of Parole, 96 A.D.3d 1321 (3d Dept. 2012); Molinar v New York State Division of Parole, 119 A.D.3d 1214 (3d Dept. 2014); Borrell v New York State Division of Parole, 123 A.D.3d 1206 (3d Dept. 2014) *mot. recon. den.* 2015 WL 233946.; Del Rosario v Stanford, 140 A.D.3d 1515 (3d Dept. 2016); Perea v Stanford, 149 A.D.3d 1392 (3d Dept. 2017). The Board may consider an Order of Deportation. Silvero v Dennison, 28 A.D.3d 859 (3d Dept. 2006), but the release decision is still discretionary. Borrell v New York State Division of Parole, 123 A.D.3d 1206 (3d Dept. 2014) *mot. recon. den.* 2015 WL 233946.

15. There is no requirement under Executive Law 259-i(2)(d) that the Parole Board must grant CPDO merely because the inmate has completed his minimum term and is subject to a final order of deportation. Samuel v Alexander, 69 A.D.3d 861 (2d Dept. 2010). CPDO eligibility

as noted is only one factor to be considered in granting parole under Executive Law §259-i(2)(d). Eligibility does not equate to entitlement for parole release or preclude consideration of the usual factors in the Executive Law relevant to making that decision per Executive Law §259-i(2)(c). The Parole Board still has its discretion. Ortiz v. State Board of Parole, 239 A.D.2d 52 (4th Dept. 1998); *leave denied* 92 N.Y.2d 811; Oyekoya v New York State Department of Parole, 276 A.D.2d 960 (3d Dept 2000); Hunter v New York State Division of Parole, 21 A.D.3d 1178 (3d Dept 2005); Borrell v New York State Board of Parole, 85 A.D.3d 1515 (3d Dept. 2011) *lv.app.den.*, 17 N.Y.3d 718 (2011).

16. Petitioner's final allegation is that the Board's decision is impermissibly lacking in detail. This is not correct. The Board is not required to state each factor it considers, or weigh each factor equally or grant parole due to exemplary behavior. Comfort v New York State Division of Parole, 68 A.D.3d 1295 (3rd Dept. 2009); Hamilton v New York State Division of Parole, 119 A.D.3d 1268 (3d Dept. 2014). The Board's decision was sufficiently detailed to inform the denial of parole, satisfying the criteria set forth in N.Y. Exec. Law § 259-i. Siao-Pao v. Dennison, 11 N.Y.3d 777, 866 N.Y.S.2d 602 (Ct. App. 2008); Matter of Green v. New York State Div. of Parole, 199 A.D.2d 677, 605 N.Y.S.2d 148 (3d Dept. 1993). The reasons stated by the Board for its determination are sufficient grounds to support their decision. People ex rel. Yates v. Walters, 111 A.D.2d 839, 490 N.Y.S.2d 573 (2d Dept. 1985); Matter of Ganci v. Hammock, 99 A.D.2d 546, 471 N.Y.S.2d 630 (2d Dept. 1984); Matter of Vuksanaj v. Hammock, 93 A.D.2d 958, 463 N.Y.S.2d 61 (3d Dept. 1983); Matter of Pina v. Hammock, 89 A.D.2d 799, 453 N.Y.S.2d 479 (4th Dept. 1982).

17. The inmate may not review the Board's weighing process or assess whether the Board gave proper weight to the relevant factors, since it is not required to state each factor it

considers, or weigh each factor equally or grant parole due to exemplary behavior. Comfort v New York State Division of Parole, 68 A.D.3d 1295, (3rd Dept. 2009); Hamilton v New York State Division of Parole, 119 A.D.3d 1268 (3d Dept. 2014). The due process clause is not violated by the Board's balancing of the statutory criteria, and which is not to be second-guessed by the courts. Mathie v Dennison, 2007 WL 2351072 (S.D.N.Y. 2007); MacKenzie v Cunningham, 2014 WL 5089395 (S.D.N.Y. 2014).

18. In the event of an unfavorable Judicial ruling, then the question of a remedy would arise. In such a situation, petitioner is not entitled to release from incarceration. Rather, at most, the petitioner would be entitled to a *de novo* interview. Matter of Quartarraro New York State Division of Parole, 224 A.D.2d 944 (1st Dept 1996), *lv. denied* 88 N.Y.2d 805 (1996). If a *de novo* consideration is directed, the respondent respectfully request that the Board be given at least 60 days to schedule and provide the *de novo* interview.

19. The petitioner has the burden of showing that the Parole Board's determination is irrational "bordering on impropriety" before judicial intervention is warranted. Russo v. New York State Board of Parole, 50 N.Y.2d 69 (1980); Matter of Despard v. Russi, 192 A.D.2d 1076 (4th Dept. 1993). Thus, it is well established that the Board's release decisions are discretionary, and if made in accordance with the statutory requirements, determinations are not subject to judicial review. Matter of Saunders v. Travis, 238 A.D.2d 688, 656 N.Y.S.2d 404 (3rd Dept. 1997), *lv denied*, 90 N.Y.2d 805 (1997); Matter of Davis v New York State Division of Parole, 114 A.D.2d 412 (2nd Dept. 1985); Matter of Harden v. New York State Board of Parole, 103 A.D.2d 777 (2nd Dept. 1984); Matter of Ganci v. Hammock, 99 A.D.2d 546 (2nd Dept. 1984). Petitioner has not demonstrated that any abuse in this regard by the Board has occurred.

20. For the foregoing reasons, the petition should be dismissed.

RECORD BEFORE RESPONDENT

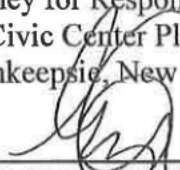
- 1) Sentence and Commitment Order
- 2) Pre-Sentence Investigation Report. **** Please note, this document is exempt from disclosure pursuant to CPL §390.50 and is submitted for in camera review only.**
- 3) Parole Board Report. **** Please note the page marked "confidential" at the top is confidential and is exempt from disclosure as intra-agency materials containing evaluative opinion information and is submitted herewith for in camera review only.**
- 4) Transcript of Board Interview.
- 5) Parole Board Release Decision Notice.
- 6) Brief on Administrative Appeal.
- 7) Statement of Appeals Unit Findings
- 8) Administrative Appeal Decision Notice
- 9) Sentencing Minutes/Affidavit
- 10) COMPAS instrument- redacted and versions to petitioner.
- 11) TAP/Offender Case Plan
- 12) Deportation Order
- 13) Judge and DA letters. **In camera only. Grigger v. NYS Div. of Parole, 11 AD850 (3d Dept. 2004); Matter of Ramahlo v Bruno, 273 AD2d 521 (3d Dept. 2000), *lv. den.* 95 NY2d 767 (2000); Mongo v NYS Div. of Parole, 244 AD2d 781 (3d Dept. 1997).**
- 14) Unreported Decision

WHEREFORE, respondent requests that the petition be denied.

DATED: Poughkeepsie, New York
January 19, 2018

Yours, etc.,

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